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No. 93 - 1145

In The
Supreme Court of the United States
October Term, 1993

JOHN E. FILIOS, ET AL.,
PETITIONERS

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITIONERS' SUPPLEMENTAL MEMORANDUM ON TIMELINESS

STEPHEN S. OSTRACH
(Counsel of Record)
PATRICK W. HANIFIN
New England Legal
Foundation
150 Lincoln Street
Boston, MA 02111
(617) 695-3660

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PETITIONERS' SUPPLEMENTAL MEMORANDUM ON TIMELINESS

Pursuant to an Order entered by the Court on March 4, 1994, petitioners John A. Filios et al. submit this Supplemental Memorandum on the timeliness of the Petition filed in this case.

I. CHRONOLOGY OF THIS ACTION

For more than seven years, military retirees living in Massachusetts have sought a determination as to whether that state's policy of levying state income tax on military retirement benefits while totally exempting from that tax retirement benefits received by all state and municipal retirees discriminates against federal employees in violation of 4 U.S.C. §111. Pet. A. 7-8.

From the outset this matter has been pursued on behalf of all veterans living in Massachusetts; the 27 individuals ("veterans") who have invested their time and energy in pursuing this matter have done so only as representatives of the state's 24,000 military retirees. Pet. A. 4. At no stage has this matter turned on the individual circumstances of any of the named parties, as shown by the Stipulation entered into below and recognized by the Appellate Tax Board's decision. Pet. A. 4, 6.

Four years after the veterans first appeal was filed, the Appellate Tax Board ruled against them on October 8, 1991. Pet. A. 1. The veterans asked the Board for a report pursuant to Mass. G.L. c. 58A, §13 and later sought reconsideration in light of this Court's intervening decision in Barker v. Kansas, __ U.S. __, 118 L. Ed. 2d 243 (1992). Pet. A. 2, 25. On July 1, 1992, the Board denied reconsideration and issued a report. Pet. A. 2-43. The decision ran against the fourteen veterans (and thirteen spouses) whose appeals had been consolidated by the Board. Pet. A. 7-8. The caption of the Board's decision listed appellants as "John E. and Eleanor G. Filios et al." The individual taxpayers' names were given only in a table in the body of the Report. Pet. A. 2, 7-8.

One notice of appeal was filed on behalf of all 27 taxpayers. The notice used the precise wording the Board used to enter judgment against them, "John E. and Eleanor G. Filios et al." Filios et al. v. Commissioner of Revenue, 415 Mass. 806, 807 n.2 (1993), Pet. A. 45. In his brief to the Supreme Judicial Court, the Commissioner challenged the adequacy of the notice as to veterans

other than John and Eleanor Filios. Id." In order to correct any formal deficiency in the notice, appellants filed a motion to amend the notice to separately name all 27 taxpayers, a remedial procedure approved by Cummings v. City Council of Gloucester, 28 Mass. App. 345, 349 (1990), the same case relied upon by the Commissioner. That motion was not opposed.

On July 13, 1993, the Massachusetts Supreme Judicial Court affirmed the Board's decision. Pet. A. 44-51. Unfortunately the decision did not reflect appellants' unopposed motion to amend the notice of appeal and so it held that "[t]he only appeal before us is that of John E. and Eleanor G. Filios." Pet. A. 45, n.2. Accordingly that court did not, on July 13 1993, decide the merits of the appeal filed on behalf of the other 25 veterans and spouses.

The veterans then instructed their counsel to prepare an application to this Court for a writ of certiorari to review the Supreme Judicial Court's decision. In order that that application reflect the representative nature of this litigation, counsel promptly requested the Supreme Judicial Court to reconsider its decision at least insofar as it did not grant the motion for leave to amend the notice of appeal. Pet. A. 52. That court did not act upon that request for several months. In the interim, petitioners' counsel requested this Court to extend the time for applying for a writ of certiorari, a request denied by Justice Souter on October 15, 1993.

On October 26, 1993, the Supreme Judicial Court did allow the request to reconsider its earlier decision. Pet. A. 52.[1] While

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1. The lower court's action thus eliminates any argument the Respondent might belatedly seek to raise challenging the process which Petitioners followed below. "Even without a timely petition for rehearing, the court below may change its judgment and thus affect the commencement of the time for petitioning for certiorari. A court may make such a change . . . in response to a motion for clarification . . . ". R. Stern, E. Gressman, S. Shapiro and K. Geller, Supreme Court Practice, §6.4 at 287 (7th ed. 1993).

the court's order did not change its prior legal analysis of the merits of the veterans' claims, it did modify its judgment to provide that all 27 taxpayers' appeals were properly before it. Id. It was only after the October 26 Order that the 25 taxpayers other than John and Eleanor Filios had a final judgment on the merits from the highest court of the state, a jurisdictional prerequisite for review by this Court. 28 U.S.C. §1257; R. Stern, E. Gressman, S. Shapiro and K. Geller, Supreme Court Practice, §3.14 (7th ed. 1993)("Stern and Gressman").

Before that date the only substantive decision affecting those 25 taxpayers was the 1991 decision by the Appellate Tax Board, a decision by an administrative body which clearly cannot be reviewed by this Court. See Stern and Gressman, §3.18. The only judicial decision affecting the 25 taxpayers was the July 13, 1993, opinion by the Supreme Judicial Court which had concluded, entirely as a matter of state procedure, that their appeals were not properly before it. As a decision resting upon a state law ground, this Court would have had no jurisdiction to grant review to those 25 taxpayers even though the lower court's decision on the substantive issue before it did involve a reviewable federal question. See R. Stern, E. Gressman, S. Shapiro and K. Geller, Supreme Court Practice §3.25 (7th ed. 1993).

The October 25, 1993, Order of the Supreme Judicial Court granting petitioners' request for reconsideration changed the situation entirely. By adding the 25 taxpayers as parties to its judgment, the Supreme Judicial Court finally, and for the first time, put them in position to ask this Court to hear their case. The Petition here was filed on November 22, 1993, well within 90 days after the October 26 Order. Cf. 28 U.S.C. §2101(c).

II. THE PETITION IS TIMELY AS TO ALL PETITIONERS.

By Order of March 4, 1994, this Court ordered supplemental memoranda on the timeliness of the petition filed on November 22, 1993 in this case in light of 28 U.S.C. §2101(c).

For the following reasons, Petitioners believe their petition was timely.

Rule 13.4 of the Rules of this Court provides that:

> if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment."

Since the Supreme Judicial Court expressly "allowed" the request for reconsideration, Pet. A. 52, the clear language of Rule 13.4 provides that the time for seeking certiorari began on October 26, not July 13, 1993. Indeed in his Opposition to the Petition the Respondent appears to have conceded that the Petition in this case, which was filed on November 22, 1993, was timely as to all petitioners other than John A. and Eleanor G. Filios. See Brief in Opposition at 13-14 (state court order "arguably gave other parties 90 days to file a petition [after October 26, 1993]"). Given that this case has never been about the particular individual situation of any of the veterans, that concession would seem to make the Commissioner's argument that the Petition was untimely as to John and Eleanor Filios almost entirely irrelevant.

In any event, the Commissioner's argument that the petition was untimely as to John and Eleanor Filios is clearly wrong. He correctly cites Rule 13 as controlling on the timeliness of petitions. Brief in Opposition at 13. However, he fails to note that Rule 13.4, as quoted above, specifically deals with the exact situation here. As the United States noted (at 8, n. 6), in its Brief as Amicus Curiae Supporting Petitioners, the Rule provides that "if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the . . . entry of a subsequent

judgment." (Emphasis supplied). Thus, contrary to the Commissioner's belief, Brief in Opposition at 14, the October 26, 1993 Order did extend the time for John and Eleanor Filios to file. See Stern and Gressman, §6.3 at 286 (Rule 13.4 removes any doubt whether filing of a petition for rehearing by one party tolls the time for all other parties to seek certiorari.)

The leading commentary on this Court's practice notes that "[t]he consistent practice of the Court has been to treat petitions for rehearing . . . as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing." Stern and Gressman, §6.23 at 284; see also United States v. Ibarra, 502 U.S. __, 116 L. Ed. 2nd 1, 7 (1991)(petition for rehearing renders original judgment nonfinal for purposes of appeal so long as petition is pending). Thus not only was the November 22, 1993 petition timely in light of Rule 13.4, if Petitioners had filed an application for a writ of certiorari prior to the October 26, 1993 Order, it might have been argued that such an application would have been premature.

Petitioners are not aware of any other argument that has been raised against the timeliness of their Petition by the Respondent. However, in light of this Court's March 4, 1994 Order, counsel will address an additional argument, even though it is one which Respondent has not, to date, chosen to raise.

That argument would be that the lower court's Order of October 26, 1993, allowing Petitioners' request for reconsideration, did not trigger the running of a new 90 period for seeking review because it dealt only with matters of form, not substance. Cf. Department of Banking v. Pink, 317 U.S. 264, 266 (1942). This Court has noted that the "mere fact that a judgment previously entered is reentered or revised in an immaterial way does not toll the time in which review must be sought." FCC v. League of Women Voters, 468 U.S. 364, 373 n. 10(1984)(emphasis supplied). Similarly if a judgment is revised only to correct a "formal defect" the time for seeking certiorari runs from entry of the original judgment. See Stern and Gressman, §6.4 at 289, n. 26 citing

Missouri v. Jenkins, 495 U.S. 33, 45 n. 13 (1990).

That proposition has no application here. While the Supreme Judicial Court's October 26 Order did not change that court's legal analysis, it did substantially change the legal rights of 25 of the 27 taxpayers who had appeared before it. Before entry of the Order allowing reconsideration, those 25 veterans and spouses did not have a right to seek review by this Court of their federal claim that 4 U.S.C. §111 barred state taxation of their veterans benefits. After entry of that Order, as the lower court specifically intended would happen, see A. 52, those 25 taxpayers did have a final reviewable decision. This Court has noted that:

> [t]he test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U.S. 206, 212 (1952).

The Supreme Judicial Court's October 26 Order reversed its earlier holding that state procedural law barred the 25 taxpayers from raising their federal claim. That was a substantive judicial action which, by removing the independent state law ground that would otherwise have been an insuperable barrier to review by this Court, clearly changed the taxpayers' "legal rights." The petition thus meets the "practical test" and the case does not fall within the "mere form" exception to the Court's "consistent practice" of treating petitions for rehearing as tolling the certiorari period.

Even if the law on this point were not clear, Petitioners believe it would be particularly unfortunate to belatedly allow the timeliness issue to prevent this Court from considering the significant federal issue they have worked for more than seven years to have resolved. As noted above, the issue raised here directly and currently affects all 24,000 military retirees living in

the Commonwealth and, as the amicus brief filed by the United States demonstrates, it may come to affect state tax treatment of retirement benefits received by millions of veterans nationally. Postponing[2] review of the legal analysis employed below, particularly on the basis of a timeliness argument which Respondents' own counsel did not raise, would not inform this Court's ultimate decision or advance any other interest.

The underlying issue here is whether states can avoid the clear command of 4 U.S.C. §111 and this Court's decisions in Davis v. Michigan Department of the Treasury, 489 U.S. 803 (1989) and Barker v. Kansas, 503 U.S. __, 118 L. Ed. 2nd 243 (1992) and continue to use their tax laws to discriminate against federal employees. As the Solicitor General warned in his amicus brief "[i]f the decision in this case were allowed to stand, it would serve as a guidepost for States seeking to circumvent the clear restrictions imposed by 4 U.S.C. 111 and this Court's prior decisions." Brief for the United States at 8. So long as Massachusetts' decision stands as good law, that "guidepost" will be a road map for any state that wishes to distort its tax laws "to benefit itself and those in privity with it . . . ," the precise type of discrimination that section 111 was intended to bar. Davis, 489 U.S. supra at 815, n.4.

The Petition here raises an important issue of national significance and it was timely filed. Petitioners believe that this court should grant the petition for a writ of certiorari or, in light of the strong support given Petitioners' position by the United State's amicus brief, summarily reverse the decision below.

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2. Review would only be postponed, not barred, because Massachusetts continues to tax veterans' retirement benefits while exempting its own retirees' benefits. Many more appeals filed by Petitioners and other veterans are now pending before the Appellate Tax Board. Those appeals are presumably controlled by the prior decisions of the Board and the lower court; and once judgments are entered in those appeals, review could be sought from this Court.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition and the Reply Brief, petitioners request that their application for a writ of certiorari be granted or, in the alternative, that the decision below be summarily reversed.

Respectfully submitted,
John E. Filios et al.
By their attorneys,

STEPHEN S. OSTRACH
(Counsel of Record)
PATRICK W. HANIFIN
New England Legal
Foundation
150 Lincoln Street
Boston, MA 02111
(617) 695-3660

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